MEMORANDUM OF LAW

DATE: January 4, 1995

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Public Safety Officers' Procedural Bill of Rights Regarding Fitness for Duty Examinations

Question Presented

Is the City precluded from conducting fitness for duty examinations of police officers by the procedural safeguards found in the Public Safety Officers' Procedural Bill of Rights, Government Code sections 3300-3311 ("Bill of Rights")?

Short Answer

No. A fitness for duty examination is not punitive in nature and is therefore not an interrogation for purposes of the Bill of Rights. Courts have recognized the unique need of police departments nationwide to be able to ascertain with certainty that officers are fit to perform their unique duties, especially those duties which require them to carry a badge and gun.

Background

Recently, a police sergeant was placed on leave after exhibiting behavior which, in the department's view, made her unfit to perform her usual and customary duties. The behavior included a positive random drug test followed by a threat of suicide. Prior to allowing the sergeant to return to work the City required that she submit to a psychiatric fitness for duty evaluation. The attorney for the Police Officers' Association ("POA") challenged the evaluation and asserted that the fitness for duty examination was an investigation for purposes of the Bill of Rights because it could lead to termination.

The attorney contends that a termination under such circumstances would be a punitive action and is therefore subject to the procedural protections of the Bill of Rights. He further asserts that under the Bill of Rights any officer subject to a fitness for duty examination must be allowed to have his or her representative present, to tape record the proceedings, and to have only the doctor's conclusions, not a full medical report, released to the City.

Finally, the attorney asserts that City may only be told that either the officer is fit for duty or that the officer is not fit for

duty. He has indicated that release to the City of any backup medical or psychological documentation generated as a result of a fitness for duty examination violates the doctor/patient privilege.

Based upon his interpretation of the privilege, the attorney has indicated that police officers will no longer submit to fitness for duty examinations unless a representative is present and the examination recorded. He has also indicated that officers will require a representation by the department and the examining doctor that no information obtained during the course of the examination will be released to the City.

Analysis

I. Privacy Interests

The courts have long recognized the need for special care in the selection and retention of police officers. The fact that police officers carry guns and exercise a great deal of control over the individuals with whom they come in contact places a great duty of care on municipalities and states in the selection and retention of qualified officers. Courts have balanced the employers' need to hire only the most highly qualified individuals as police officers against those individuals' right to privacy.

The right to privacy, which counsel for the POA asserts is breached by the fitness for duty examination, is found in the California Const. art. I, Section 1 and in the U.S. Const. amend. I. It becomes applicable to the states through amendment XIV. We found no case law specifically addressing the right to privacy in the context of a fitness for duty examination in California case law. However, since the analysis of the right to privacy would differ only slightly, if at all, from California law to federal law, we look to federal law for guidance in this case.

The recently decided case of Thompson v. City of Arlington, Tex., 838 F. Supp. 1137 (N.D.Tex. 1993), thoroughly analyzed a municipal employee's constitutional right to privacy balanced against a city's interest in obtaining medical information for purposes of a fitness for duty determination. For clarity, an outline of the case follows.

In Thompson, a police officer sued the City and individual defendants alleging that the defendants had violated her civil rights by obtaining her psychiatric and psychological records. The officer had taken an overdose of prescription drugs and was subsequently hospitalized for a month. After release from the hospital, she was treated with drug therapy and counseling. Additionally, the officer had previously suffered from depression for approximately two years, and had sought psychiatric and psychological counseling.

Before authorizing the officer to return to regular duty (i.e., to exhibit a badge, carry a gun, wear her police uniform or engage in other regular police officer activities) the City required that she consent to

the release to the City of her mental health records. The requirement was imposed after the officer's doctor and consulting psychologist had advised the City that she was fit to return to duty. After initially refusing to do so, the officer signed an authorization for release of her medical and psychological records. The City reviewed the records and, contrary to the doctor's opinion, determined that the officer should remain on restricted duty and perform only clerical duties. Additionally, the City required that the officer be subject to ongoing psychiatric evaluations. To facilitate the City's use of the evaluations, the City required the officer to authorize release of all her future mental health records, as they were created. Her doctors were also required to submit various reports as requested by the City.

In a detailed and thorough analysis, the court noted the Supreme Court's recognition of the two basic branches to the right of privacy under the Fourteenth Amendment. The first, the autonomy branch, has been referred to as the "'decision making branch of the privacy right,' which relates to matters such as a marriage, procreation, contraception, family relationships, child rearing, and education." Id. at 1144. It is not applicable to this case. The second branch, the confidentiality branch, "includes the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern." Id. at 1144. This branch was the focus of the court's analysis in the Thompson case and applies in the instant case.

The Thompson court indicated that when evaluating whether there has been an unconstitutional breach of confidentiality, "a balancing standard is appropriate as opposed to the ┌strictero compelling state interest analysis involved when autonomy of decisionmaking is at issue." Id. at 1144.

Recognizing that this balancing of a personal intrusion against a state interest is a legal function, the court noted that " ┌aon intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest." Id. at 1144. In short, the right of privacy does not absolutely protect an individual's medical records from disclosure. A balancing test is required. The court recognized that the "nature of the work to be done by the employee and the dangers that can result from it" need to be considered in applying the balancing test. Id. at 1145. In reaching its decision, the court specifically emphasized the right to privacy infringements that had been justified due to the nature of the work done by firefighters and police officers. Id. at 1145.

Although the court acknowledged the officer's privacy interest in her medical health records, it nonetheless found that " ┌tohe power vested in police officers has served as a justification for infringement

of their privacy interests." Id. at 1145. The court went on to cite Treasury Employees v. Von Raab, 489 U.S. 656, 671 (1989) and held "that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."

The court explained its reasoning as follows:

> Once the officials of City became aware of plaintiff's mental illness and that it had led to self-inflicted injury and a hospitalization where she underwent drug therapy, the officials of City would have been derelict in their duties to the public, plaintiff and plaintiff's fellow officers if they had not required full disclosure by plaintiff of information pertaining to her condition and treatment and if they had not proceeded with utmost caution before allowing her to return to regular police duties. Accepting as true the allegations of the complaint, the court determines as a matter of law that the privacy interests of plaintiff in her mental health records are outweighed by the public interest in having full information in the hands of City's police department on the most important subject of whether plaintiff was mentally capable of exercising in an effective and safe manner the awesome and dangerous power of an armed police officer. Just as employees of the United States government who are involved in law enforcement activities should anticipate inquiries into their conditions of health, plaintiff should have, and undoubtedly did, "expect intrusive inquiries into her mental fitness for those special functions of a police officer."

Thompson v. City of Arlington, Tex., 838 F. Supp. 1137, 1147 (N.D.Tex. 1993) (emphasis added).

The court's logic applies with equal vigor to the arguments presented by counsel for the POA. The City's duty to the public as well as other police officers precludes it from allowing an officer to participate in the full range of police duties unless the City has first taken every precaution to ensure that the officer is fit, both mentally and physically, to perform those duties. Fitness for duty examinations are the City's rational attempt to deal with an issue that is wholly

within the City's control. Failure to take proper precautions could result in the City being found liable for negligent retention and/or hiring. It is both the City's right and duty to ensure that its officers are qualified and fit for duty.

II. Punitive Action

Counsel for the POA has also asserted that fitness for duty examinations are punitive in nature solely because such examinations may lead to termination. He asserts that it is the consequence, rather than the purpose behind the action, which is controlling for purposes of invoking the Bill of Rights. However, the Bill of Rights, at section 3303, specifically addresses only those actions that are punitive in nature. Punitive is defined in the dictionary as: inflicting, awarding or involving punishment or penalties: aiming at punishment. Webster's Third New International Dictionary 1843 (1976).

By definition, a fitness for duty examination is not an investigation or interrogation which could lead to discipline. It is a medical or psychological evaluation conducted by a doctor. The sole purpose of the evaluation is to determine the officer's ability to perform the essential functions of the job. Such an examination is not designed to punish an officer for physical or mental disabilities.

It is clearly inappropriate to take disciplinary or punitive action against an officer for a mere medical or psychological condition as opposed to some improper action on the part of the officer. Absent a showing that a fitness for duty evaluation is specifically ordered for punitive purposes, the specific language of Government Code section 3303 precludes an officer from invoking the procedural safeguards of the Bill of Rights.

Conclusion

Although employees do have a privacy interest in maintaining confidentiality in their medical and psychological records, that interest must be balanced against the government's legitimate interest in determining whether an individual is fit to serve as a police officer. Municipal employers have an obligation to select and retain police officers who are fit for duty. When public safety is at issue, as it clearly is when police officers are concerned, the employee's right of privacy may be outweighed by the governmental interest. A fitness for duty examination in appropriate circumstances is one such example where the scales tip in favor of the governmental interest. Moreover, since such a determination is not punitive, the Bill of Rights is not applicable.

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